

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

NEW ENGLAND CENTRAL RAILROAD, INC.,
Plaintiff,

v.

SPRINGFIELD TERMINAL RAILWAY
COMPANY and BOSTON AND MAINE
CORPORATION,
Defendants

Civil Action No.: 04-30235-MAP

**THE PLAINTIFF NEW ENGLAND CENTRAL RAILROAD, INC.'S
OPPOSITION TO THE DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

The plaintiff New England Central Railroad, Inc. ("NECR") hereby submits this *Opposition* to the Defendants' *Motion for Partial Summary Judgment*. As grounds therefore, the NECR states that the defendants are not entitled to summary judgment because: (1) the NECR was not, as a matter of law, negligent or grossly negligent; (2) there is ample evidence of the defendants' gross negligence; (3) the defendants' counterclaims are preempted by federal law; (4) the modified *Trackage Rights Agreement* imposes on the defendants the obligation to indemnify regardless of the condition of the track; and (5) the NECR's breach of contract counts state claims upon which relief may be granted.

In support of its *Opposition*, the NECR expressly incorporates herein by this reference the following:

1. *Memorandum of Law in Support of the Plaintiff's Opposition to the Defendants' Motion for Partial Summary Judgment;*
2. *Plaintiff New England Central Railroad, Inc.'s Concise Statement of Facts in Support Of Its Opposition To The Defendant's Motion For Summary Judgment In Response To The Defendants Concise Statement Of Facts;*
3. the transcript of the deposition of Richard R. Boucher, a copy of the relevant portions of which is attached as Exhibit "J," at p. 8-12, 29-31;
4. the transcript of the deposition of Rick T. Boucher, a copy of the relevant portions of which is attached as Exhibit "K," at p. 9, 11-13, 21-22;
5. the transcript of the deposition of Michael Lawyer, a copy of the relevant portions of which is attached as Exhibit "L," at p. 15-18, 24-28, 66;
6. the transcript of the deposition of Roger Bergeron, a copy of the relevant portions of which is attached as Exhibit "M," at p. 90-94, 118, 152-153, 172-174;
7. Initial Rail Equipment Accident/Incident Record, a copy of which is attached as Exhibit "N;"
8. Incident Documentation Form, a copy of which is attached as Exhibit "O;"
9. *Second Cause Of Action, Formal Complaint and Petition for Declaratory Order Before the Surface Transportation Board*, copy of which is attached as Exhibit "P;" and
10. *January 10, 2006 Surface and Transportation Board Decision*, a copy which is attached as Exhibit "Q."

WHEREFORE, for the foregoing reasons, in addition to the reasons stated in the *Memorandum of Law* in support of this *Opposition*, the plaintiff NECR respectfully requests that the defendants' *Motion for Summary Judgment* be DENIED.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(D), the plaintiff NECR respectfully states that oral argument may assist the Court and requests a hearing on its *Opposition* to the Defendants' *Motion for Partial Summary Judgment*.

Respectfully submitted,
NEW ENGLAND CENTRAL RAILROAD, INC.
by its attorneys,

/s/ Michael B. Flynn

Michael B. Flynn BBO#559203
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DATED: April 24, 2007

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EXHIBIT “J”

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NEW ENGLAND CENTRAL
RAILROAD, INC.

Plaintiff,

VS.

Civil Action No.
04-30235-MAP

SPRINGFIELD TERMINAL RAILWAY
COMPANY, ET AL.

Defendants.

D E P O S I T I O N
-of-
RICHARD R. BOUCHER

Taken on Wednesday, January 10, 2007,
at the offices of
New England Central Railroad, Inc.
St. Albans, Vermont.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

RICHARD A. DAVIDSON, JR., ESQ.
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400 Crown Colony Drive, Suite 200
Quincy, MA 02169

ON BEHALF OF THE DEFENDANT:

ROBERT B. CULLIFORD, ESQ.
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1 se, on the opposite side, you'd have a borderline
2 Class 3.

3 Q. What would be the condition of those joints
4 that would give rise to a warp?

5 A. They'd be considered a low joint.

6 Q. One low/one high, or both low?

7 A. No, both low.

8 Q. Okay.

9 A. Typically.

10 Q. Pardon?

11 A. Typically.

12 Q. Okay, in this situation that the condition
13 that existed?

14 A. That was, yes.

15 Q. Okay. Do you know what the proper remedial
16 action would be, pursuant to the FRA track safety
17 standards, once a warp condition is found?

18 A. What the remedial action would be?

19 Q. Yes.

20 A. Well, in that case, it would have been to tamp
21 it.

22 Q. Okay. Any other options?

23 A. None other than be restricted to -- you drop
24 it to the class that it's -- that it meets the
25 requirements that it meets.

1 Q. Do you know what was done in this instance?

2 A. It was dropped to a Class 2.

3 Q. Do you know why it wasn't tamped?

4 A. Why it wasn't tamped? Yeah.

5 Q. Why?

6 A. We hadn't got there yet with our surfacing
7 equipment.

8 Q. Why not?

9 A. I had a -- if my memory serves me, I had -- my
10 operator went on vacation, and I didn't have an
11 operator for the machine.

12 Q. Okay.

13 A. It was in the scope of work to be done. We
14 just hadn't got that far with the equipment.

15 Q. When did you expect to get that work done?

16 A. It would have been done, I would guess, within
17 the next week or two.

18 Q. Okay.

19 A. Depending on what events took place.

20 Q. Can you describe to us your understanding of
21 how a warp condition could affect a train going over
22 this section of track?

23 A. How it could affect a train going over it?

24 Q. Sure.

25 A. How a warp would affect it?

1 Q. Yeah.

2 A. Well, it can cause rock in the train, sure.

3 Q. Can you describe what you mean by rock?

4 A. Well, it's a -- we call it harmonic rock, so
5 if you got a low joint and then another low joint,
6 and if they're within a prescribed distance, it can
7 cause rock motion in the train -- roll, rock,
8 whatever you want to call it.

9 Q. Could rock result in a condition known as
10 wheel lift? Are you familiar with that term?

11 A. Yeah.

12 Q. Could that condition result as a --

13 A. Could it result?

14 Q. Yeah.

15 A. If it was extreme enough, yeah.

16 Q. What would make it extreme? Do you know, in
17 generalities?

18 A. In generality, it would have been -- unless if
19 your joints were real low, excessively low.

20 Q. Do you know if that condition existed at
21 Milepost 10.16?

22 A. It did not. Definitely did not.

23 Q. Why not?

24 A. Because I took the track measurements. I
25 GPSed them that day. We get this GPS reading.

1 Q. This is on June 8th, 2004?

2 A. Yes, I GPSed it and identified the defect.

3 Q. Subsequent to June 8th, 2004, up to July 3rd,
4 2004, did you ever take another measurement at that
5 location?

6 A. Did I personally?

7 Q. Yes.

8 A. No.

9 Q. Do you know if anyone from New England Central
10 ever took another measurement?

11 A. I'm not sure about that.

12 Q. Would it have been a common practice in the
13 Track Inspection Department to take another
14 measurement?

15 A. To take another one? Not unless it hasn't
16 been restricted or the slow order was --

17 Q. Were you aware of this condition before June
18 8th, 2004?

19 A. Definitely not. It would have been restricted
20 before.

21 Q. Would you call this condition -- is it a
22 difficult condition to notice without testing?

23 A. Some are. This particular one, static
24 measurements, you didn't have it. You had to add in
25 load. So you -- when you're taking track

1 measurements, you look for indications that the
2 track may be pumping, or any movement in the ties.
3 In this particular case, as I remember, it was
4 within half an inch, but if you added in under load,
5 the combination of the two joints within 62 feet,
6 could you come up with it.

7 Q. Did you go out there again to Milepost 10.16,
8 after June 8th, 2004, between between June 8th, 2004
9 and --

10 A. After the car run.

11 Q. But I just wanted to be clear about the
12 timeline, between June 8th, and July 3rd, 2004, did
13 you go out there again?

14 A. I may have gone through that area, but not
15 sure.

16 Q. In what capacity would you have gone through
17 the area?

18 A. Maybe inspecting or high-railing for some
19 reason. I high-rail frequently. I do track
20 inspections.

21 Q. Okay, did you notice that the condition was
22 worsening?

23 A. No.

24 Q. Okay, if we could talk about the derailment of
25 July 3rd, 2004, you're familiar with that?

1 later and replace your rail. But that could be down
2 the road.

3 Q. Okay. Fine.

4 A. A lot of times we use temporary. I don't
5 recall what they did in this case, but a lot of
6 times they use temporary panels.

7 (Deposition Exhibit 9 was marked for
8 identification.)

9 BY MR. CULLIFORD:

10 Q. Okay. If I could just refer you back one last
11 time to --

12 A. Mm-hm.

13 Q. -- Lawyer Exhibit 2, and I've got two
14 questions and then I'll be done.

15 A. Sure.

16 Q. Does this report -- the report generated by
17 the FRA test truck -- and I'm talking about the
18 entire report now, not just page 803, okay?

19 A. Mm-hm.

20 Q. Is that a significant amount of defects, in
21 your estimation, for a stretch of track this length?

22 A. Not according to the FRA, it isn't.

23 Q. I'm asking according to you.

24 A. According to me, I've never seen reports from
25 other railroads.

1 Q. I'm not asking about other railroads. You've
2 been in this business -- let me put it this way.
3 You've been in this business for 28 years. Have you
4 ever seen this number of track defects on a line of
5 this size at the same time?

6 A. On this particular line, it's the only line
7 I've ever worked.

8 Q. Okay, on this particular line, then?

9 A. So I can't compare it to any other railroad.

10 Q. I'm not asking you to compare it to another
11 railroad. I'm asking -- you've worked for 28 years
12 on one stretch of railroad. My question is in those
13 28 years, have you ever seen this many defects on
14 that stretch of railroad?

15 A. Yes.

16 Q. When?

17 A. When?

18 Q. Yes.

19 A. On -- We've had reports similar to this
20 through the years. I can't give you exact years.

21 Q. How frequently, then? Is this a frequent
22 occurrence on the New England Central?

23 A. A frequent occurrence? I don't know, I
24 wouldn't call it frequent, but --

25 Q. What I'm trying to ask you is how did we get

1 to this point? Was maintenance cut? Was capital
2 cut? Then how did all these defects arise?

3 A. Those are pretty standard track defects, I
4 would say, on any railroad. Not that I --

5 Q. I don't dispute that they're standard track
6 defects. FRA's noted all of them. But the sheer
7 number of them?

8 A. Mm-hm.

9 Q. That doesn't disturb you?

10 A. Disturb me? No.

11 Q. But through the years, this hasn't been a
12 frequent occurrence, correct, to have this sheer
13 number of defects?

14 A. That many? We may have had that many in the
15 past. I'd have to look back at all the --

16 Q. I'm not asking about whether it ever happened,
17 I'm agreeing with you it probably did happen. I'm
18 asking about the frequency of how many times it has
19 happened. Is this a regular occurrence to have one,
20 two, three, four, five, six, seven pages of defects
21 on New England Central's line, or is this some sort
22 of extraordinary event? Does this occur every year,
23 does it occur every ten years, does it occur every
24 20 years?

25 A. Sometimes more, sometimes less.

EXHIBIT “K”

UNITED STATES DISTRICT COURT
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Plaintiff,

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COMPANY, ET AL.

Defendants.

D E P O S I T I O N

-of-

RICK T. BOUCHER

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1 inspection on June 8th, 2004. Are you familiar with
 2 that inspection?
 3 A. Yes.
 4 Q. Now, just so I can keep this straight, were
 5 you on the inspection car on June 8th, 2004?
 6 A. No, I was not.
 7 Q. Okay. Now it's finally clear. Are you aware
 8 that the test car inspection of June 8th, 2004,
 9 found a defective condition at approximately
 10 Milepost 10.16?
 11 A. Am I aware of?
 12 Q. Pardon me?
 13 A. Pardon me, could you repeat the question,
 14 please?
 15 Q. Sure, well, let me show you something first to
 16 show you. This is Lawyer Exhibit 2. You'll see in
 17 the upper right-hand corner there's a number 000797.
 18 If you could just flip over to where that number is
 19 000803. First of all, have you ever seen this
 20 document before?
 21 A. No, I haven't.
 22 Q. You haven't? Okay. Okay, let's try it this
 23 way. Prior to June 8th, 2004 -- we can move away
 24 from this document for now. Prior to June 8th,
 25 2004, were you inspecting as a track inspector for

Page 7

1 New England Central?
 2 A. Yes.
 3 Q. Were you inspecting the stretch of track
 4 between Milepost 11 and Milepost 5?
 5 A. Yeah.
 6 Q. During the course of your inspections, did you
 7 ever note a defect at Milepost 10.16?
 8 A. No.
 9 Q. You did not? After June 8th, 2004, did anyone
 10 inform you that the test car had found a defect in
 11 Milepost 10.16?
 12 A. Yes.
 13 Q. Who informed you of that?
 14 A. Supervisor.
 15 Q. Do you recall -- would you have been involved
 16 at that point in deciding the appropriate remedial
 17 action to be taken in response to that defect?
 18 A. No.
 19 Q. Who would have?
 20 A. It was supervisor.
 21 Q. And by supervisor, just who are you referring
 22 to?
 23 A. R.R. Boucher.
 24 Q. Okay. Did he ever -- did R.R. Boucher ever
 25 communicate to you what remedial action was taken in

Page 8

1 response to discovering this defect?
 2 A. Not that I recall, I guess.
 3 Q. Okay. But -- and help me here. You were
 4 aware that there was a defect at Milepost 10.16
 5 after June 8th, 2004?
 6 A. Yeah.
 7 Q. After June 18th, 2004, when was the next time
 8 you inspected the area at or around Milepost 10.16?
 9 A. I don't recall.
 10 Q. How often were you inspecting the track
 11 between Milepost 11 and Milepost --
 12 A. Twice a week, under federal regulations. I
 13 don't recall dates.
 14 Q. Okay. Was it within two days, three days,
 15 that day? You don't recall that? Doesn't have to
 16 be the specific date, just --
 17 A. I don't recall, yeah.
 18 Q. Do you recall how many times -- do you recall
 19 the first time you inspected -- I don't need to know
 20 the date -- or how soon thereafter, when you went
 21 out and inspected at Milepost 10.16, did you note
 22 the defect then?
 23 A. No.
 24 Q. You didn't? You knew it existed, but you
 25 didn't note --

Page 9

1 A. It was already documented.
 2 Q. Yeah, but did you see it? Did you look at it
 3 and say, Oh, I see now that that's a defect?
 4 A. I believe it was predetermined before I had to
 5 inspect it.
 6 Q. I understand that, but okay, this is what I'm
 7 asking you. Prior to June 8th, 2004, you were
 8 inspecting the track?
 9 A. Correct.
 10 Q. You hadn't noticed a defect --
 11 A. No.
 12 Q. -- correct?
 13 A. No.
 14 Q. You were informed that there was a defect
 15 there?
 16 A. Correct.
 17 Q. So when you went out there again and you're at
 18 Milepost 10.16, did you note the defect? Did you
 19 say, okay, that condition exists?
 20 A. Prior to?
 21 Q. After you were informed that it existed. You
 22 didn't know it existed prior to June 8th?
 23 A. Right.
 24 Q. You found out on June 8th, or soon thereafter,
 25 that it did exist?

Page 10

1 A. Right.
 2 Q. Then you're out there inspecting twice a week
 3 thereafter, correct?
 4 A. Correct.
 5 Q. So you get to Milepost 10.16. Did you see the
 6 condition? In other words, when you're at Milepost
 7 10.16 on your next inspection, did you agree that a
 8 defective condition existed, looking at it that day?
 9 A. Yes, and it was slowered.
 10 Q. That's not what I'm asking. Do you agree with
 11 what the FRA test truck found, that a condition
 12 known as warp --
 13 A. Yes, I agree.
 14 Q. Based on your own personal observations, or
 15 based on what you were told?
 16 A. No, based on the measurements and GPS readings
 17 given, that it was gone back and determined that it
 18 was in fact there.
 19 Q. Who determined that?
 20 A. Myself and R.R. Boucher.
 21 Q. So you did go out there after the test truck
 22 had gone over it?
 23 A. Correct.
 24 Q. Knowing that the condition existed?
 25 A. Yes.

Page 11

1 Q. And you agreed with the determination of the
 2 test truck?
 3 A. I mean it -- yes.
 4 Q. Okay.
 5 A. Agreed with the measurements that they'd given
 6 us.
 7 Q. How did you agree with the measurements? Did
 8 you do your own measurements?
 9 A. Yes, we did.
 10 Q. Okay. So during the period June 8th, 2004, to
 11 July 3rd, 2004, you're inspecting twice a week; is
 12 that correct?
 13 A. That's correct.
 14 Q. Did you inspect at Milepost 10.16 twice a
 15 week?
 16 A. Yes.
 17 Q. Did you do any additional measurements between
 18 the initial measurement you did to confirm the FRA
 19 test car results and July 3rd, 2004?
 20 A. The date of -- or I guess I don't recall
 21 exactly at what specific time we did the
 22 measurements, but I know that we went well north and
 23 south of the location through the curve.
 24 Q. Yeah?
 25 A. The measurements.

Page 12

1 Q. I understand that. You did an initial
 2 measurement to confirm the test results, correct?
 3 A. Correct.
 4 Q. What I'm asking you is were there any
 5 subsequent measurements of the condition at Milepost
 6 10.16 between your initial measurement and July 3rd,
 7 2004, I guess I don't understand your question.
 8 Q. Pardon me?
 9 A. I guess I don't understand your question.
 10 Q. You performed one measurement, if I understand
 11 what you're saying, soon after the test truck went
 12 over the line?
 13 A. That's correct, yeah.
 14 Q. All's I'm asking is did you do another
 15 measurement after the initial one? We've got one in
 16 the book.
 17 A. Yeah.
 18 Q. Did you ever do another measurement between
 19 that initial measurement and July 3rd, 2004?
 20 A. Not that I can recall, I guess, no.
 21 Q. Do you recall going out there at your
 22 twice-weekly inspections and noticing that the
 23 condition remained the same, or was it worsening or
 24 was it getting better?
 25 A. To my knowledge, it remained the same.

Page 13

1 Q. Okay, did you notice that the track at
 2 Milepost 10.16 was also out of alignment?
 3 A. No.
 4 Q. Okay. Did you notice a condition such as a
 5 low joint where the joint on the low-end side was
 6 sinking in the mud or the ballast was foul?
 7 A. I don't recall.
 8 Q. Okay, and seeing as how this condition existed
 9 pretty close to a crossing, do you, as a normal
 10 course of practice, sort of use a heightened sense
 11 of an investigation at or near public grade
 12 crossings?
 13 A. Public grade or --
 14 Q. Public at-grade crossings, yes, or private.
 15 A. Yes.
 16 Q. What more would you do at or near a public or
 17 private at-grade crossing that you wouldn't do, say,
 18 in the middle of nowhere?
 19 A. Well, no, I feel I do an adequate job of the
 20 entire lines.
 21 Q. I understand that, and I'm glad you do.
 22 A. I guess you say I stop for each crossing. I
 23 guess other than that.
 24 Q. What do you do when you stop at each crossing
 25 would probably be a good question.

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1 Q. Do you recall what the cause of the derailment
2 on July 3rd, 2004, was?
3 A. No.
4 Q. Okay, did I hear you correctly, though, you
5 did participate in the investigation?
6 A. Yes.
7 Q. And then what did you do, hand your findings
8 off to someone else?
9 A. I believe B and M was right there writing down
10 the track measurements as we were.
11 Q. But I'm not asking about B and M. I'm asking
12 about you and/or New England Central investigating
13 the derailment and determining the cause?
14 A. I didn't have anything to do with determining
15 the cause, other than assisting and taking track
16 measurements with the roadmaster.
17 Q. And who was the roadmaster?
18 A. Mike Lawyer.
19 Q. Okay. Do you have those measurements?
20 A. No, I do not.
21 Q. Okay. Do you know who does have them?
22 A. Well, other than B and M, Mike Lawyer.
23 Q. Okay, good. Did you participate in any -- in
24 preparing any budgets or cost estimates for either
25 the damage caused -- well, let's take that first

Page 19

1 question, is did you participate in any cost
2 estimates for the damage caused by the derailment to
3 the New England Central's line?
4 A. No.
5 Q. Did you participate in any budgets or cost
6 estimates for work to be done --
7 A. No.
8 Q. -- on the line?
9 A. No.
10 Q. Do you know who would have done that work?
11 A. I imagine the contractor, Mike Lawyer.
12 Q. Okay. If I could just ask you to look at one
13 thing, which is Lawyer Exhibit 3. Are you familiar
14 with that document, sir?
15 A. Yes.
16 Q. Could you identify it?
17 A. RailAmerica Engineering Standards and
18 Policies.
19 Q. Could you describe the purpose of that
20 document, to the best of your knowledge?
21 A. It's a guidelines, policies that we have to
22 follow.
23 Q. Guidelines for what?
24 A. For the railroad.
25 Q. For?

Page 20

1 A. For the line in which we inspect.
2 Q. Okay. Is that what you're saying?
3 A. Yeah, policies and standards.
4 Q. If I could just ask you to turn to -- and this
5 is difficult because there are no numbers, but it's
6 noted as 001044 would be the number -- it's a track
7 inspection report. Are you familiar with this
8 document, sir?
9 A. No.
10 Q. No? Okay. Does New England Central use a
11 different track inspection report form?
12 A. Yes, they do.
13 Q. Does the New England Central's track
14 inspection report contain all of the information
15 requested here?
16 A. Yes, to my knowledge.
17 Q. Do the New England Central track inspection
18 reports which you --
19 A. Other than I guess other than -- yeah, to my
20 knowledge.
21 Q. Do they contain a section to describe the
22 exception or condition on the track noted?
23 A. Yes.
24 Q. Do they contain a section to identify the
25 remedial action taken in response to the

Page 21

1 description?
2 A. Yes. Under "remarks."
3 Q. Pardon?
4 A. Remarks.
5 Q. So when you're out there, what you're saying
6 is that you have a form, and if you see a defect,
7 you note it on the form?
8 A. Correct.
9 Q. Even if that's a continuing defect, would you
10 still do that?
11 A. Not required. That I --
12 Q. Okay, you note the defect on the first day you
13 see it; is that correct?
14 A. Correct.
15 Q. And then do you note what remedial action will
16 be taken, or do you fix it that day?
17 A. If we're able to fix it.
18 Q. But if you're not able to, do you note a date
19 by which the remedial action will be taken?
20 A. They're given 30 days.
21 Q. Okay. So this is what I'm trying to get to,
22 and I don't want to confuse anybody, but you go out
23 there, you see a defect, you note it, and you know
24 you have 30 days to fix it, correct? So when you go
25 out there the next time on your track inspection

Page 22

1 report, do you note the defect again?
 2 A. Not within 30 days.
 3 Q. Okay. Okay. On your track inspection
 4 reports, did you note the defect at Milepost 10.16
 5 once you were aware of it?
 6 A. Not that I recall.
 7 Q. Why not?
 8 A. It was already documented from the geometry
 9 car.
 10 Q. But it wasn't documented by you, was it?
 11 A. No.
 12 Q. It was never documented by you?
 13 A. No.
 14 Q. And you'd never seen that inspection report,
 15 correct?
 16 A. This particular one?
 17 Q. I apologize. We'll go back to Lawyer Exhibit
 18 2. Had you ever seen this document, sir?
 19 A. No.
 20 Q. So you never saw any documentation that noted
 21 the defect at Milepost 10.16?
 22 A. General DOB.
 23 Q. You saw what?
 24 A. Daily operating bulletin.
 25 Q. But you never saw anything generated by the

Page 23

1 Track Inspection Department noting the defect?
 2 A. The --
 3 Q. And when the remedial action will be taken?
 4 MR. DAVIDSON: All right, answer the
 5 question.
 6 A. Daily track bulletin gives the slow order.
 7 It's a required document to have every day.
 8 Q. But you're the track inspector who's supposed
 9 to do an inspection and note defects, correct, on
 10 your track inspection?
 11 A. Found by myself.
 12 Q. Well, you went out and looked at the spot and
 13 agreed that it was a defect, correct?
 14 A. Correct.
 15 Q. But you never noted. It you just kind of
 16 relied on what others were doing; is that correct?
 17 MR. DAVIDSON: I don't think that's a
 18 fair characterization of his testimony in the
 19 slightest.
 20 MR. CULLIFORD: I'm asking if it's
 21 correct. I'm not characterizing the testimony. I'm
 22 just asking if it's correct.
 23 MR. DAVIDSON: Well, the tone and
 24 tenor of your last series of questioning says the
 25 opposite. He's testified --

Page 24

1 MR. CULLIFORD: You're not going -- My
 2 tone and tenor will not be reflected on the record,
 3 but --
 4 MR. DAVIDSON: He's testified that
 5 they went out right after they got the report and
 6 verified that the track was, in fact, defective, so
 7 he confirmed it on his own with his supervisor, and
 8 then he noted it in the daily operating bulletin.
 9 He saw it there; there's no reason -- He's testified
 10 there's no reason to further note it in his reports,
 11 but he sees it every day on the restrictions, still.
 12 That's what he's testified to, and you're turning it
 13 around somehow.
 14 MR. CULLIFORD: I'm not turning it
 15 around. I'm simply asking this.
 16 MR. DAVIDSON: I'm misunderstanding
 17 what you're saying; it sounds like he's
 18 misunderstanding what you're saying, as well.
 19 MR. CULLIFORD: I'm not trying to be
 20 argumentative. I apologize.
 21 MR. DAVIDSON: You're not. I'm just
 22 telling you it's not clear.
 23 BY MR. CULLIFORD:
 24 Q. Are you aware of whether FRA requires the
 25 information contained on this track inspection

Page 25

1 report? In other words, this is what I'm trying to
 2 get to, and we'll leave your report alone for a
 3 minute, but the track inspection report would
 4 contain all of this information. Are you aware of
 5 whether this is required by the FRA track safety
 6 standards?
 7 A. Yes, it is.
 8 Q. Okay, and now presuming for the moment that
 9 your track inspection safety reports have the same
 10 thing, alls I'm asking is did you note anywhere for
 11 the purposes of your records -- wait. Are you
 12 required to maintain your track inspection reports
 13 for a certain period of time by the FRA?
 14 A. Yes. One year.
 15 Q. For the purposes of your own records that FRA
 16 requires you to keep and the information required to
 17 be in them, did you note this defect in your track
 18 inspection reports?
 19 A. Not that I recall.
 20 Q. Okay, if I could just refer you one more time
 21 back to Lawyer Exhibit 2. Okay? Does this seem --
 22 this is basically a seven-page document noting
 23 conditions and defects. Does this seem like a lot
 24 of defects to you for a rail line of the size of New
 25 England Central or a rail line that was tested? I'm

EXHIBIT “L”

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NEW ENGLAND CENTRAL
RAILROAD, INC.

Plaintiff,

VS.

Civil Action No.
04-30235-MAP

SPRINGFIELD TERMINAL RAILWAY
COMPANY, ET AL.

Defendants.

D E P O S I T I O N
-of-
MICHAEL LAWYER

Taken on Tuesday, January 9, 2007,
at the offices of
New England Central Railroad, Inc.
St. Albans, Vermont.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

RICHARD A. DAVIDSON, JR., ESQ.

Flynn & Associates, P.C.

400 Crown Colony Drive, Suite 200

Quincy, MA 02169

ON BEHALF OF THE DEFENDANT:

ROBERT B. CULLIFORD, ESQ.

Senior Vice President and General Counsel

Pan Am Systems

14 Aviation Avenue

Portsmouth, NH 03801

NORMA J. MILLER, RPR
COURT REPORTERS ASSOCIATES
117 BANK STREET
BURLINGTON, VT 05401
(802) 862-4593

Page 14

1 A. Yes.
 2 Q. And the third line, correct?
 3 A. Yes.
 4 Q. Also, further down the page at Milepost 13, it
 5 refers to it again, correct? This would be the last
 6 line of that first segment, basically?
 7 A. Well, you say at Milepost 13. For
 8 clarification, it's not at Milepost 13. It is at
 9 12.75, I believe you're referring to, and it does
 10 have the same condition there.
 11 Q. Okay. And then further down at, let's say the
 12 second -- the third-to-last box, Milepost 1 or
 13 Milepost .72?
 14 A. Yes.
 15 Q. It also refers to this condition, correct?
 16 A. Yes.
 17 Q. And Milepost 1 or Milepost .03, it also refers
 18 to this condition, correct?
 19 A. Yes.
 20 Q. With the conditions we've just talked about,
 21 did you have any knowledge of their existence prior
 22 to June 8th, 2004?
 23 A. No.
 24 Q. Did anyone from New England Central have
 25 knowledge of their existence prior to June 8th,

Page 15

1 2004?
 2 A. Not to my knowledge.
 3 Q. Okay, so you've got a condition at Milepost
 4 10.16 identified as warp 62. Do you know what
 5 corrective action should be taken in response to
 6 identifying this condition?
 7 A. Yes.
 8 Q. What is that?
 9 A. You have an option of lowering the track to
 10 the next acceptable speed that it does meet the
 11 standards for, or repairing the condition.
 12 Q. And what was the remedial action elected or
 13 chosen by New England Central in response to
 14 discovering this condition that Milepost 10.16?
 15 A. The track speed was lowered to a temporary
 16 speed restriction.
 17 Q. And what was that speed?
 18 A. 25 freight, 30 passenger.
 19 Q. And would that be consistent with Class 2
 20 track?
 21 A. Yes, it would.
 22 Q. When was that remedial action taken?
 23 A. The same date of this test, June 8th, 2004.
 24 Q. Was that action taken based on the test
 25 results before you, or did someone go out and look

Page 16

1 at the site?
 2 A. It was based on these test results.
 3 Q. Did someone eventually go out and look at the
 4 site?
 5 A. Yes.
 6 Q. When and whom?
 7 A. I don't recall whether it was that day or the
 8 following. It would have been Richard Boucher.
 9 Q. Okay, Richard T. or Richard R.?
 10 A. Actually for clarification, Richard T. does
 11 not exist. It's Rick T. His legal name is Rick,
 12 not Richard. Richard R. would have been the one
 13 that inspected this.
 14 Q. Okay. Did you ever discuss the results of
 15 Mr. Boucher's physical inspection of Milepost 10.16?
 16 A. Immediately after the test?
 17 Q. Yes.
 18 A. Or after the derailment?
 19 Q. After the test.
 20 A. After the test, I don't recall having a
 21 specific conversation with him regarding individual
 22 defects.
 23 Q. Okay, then let me ask you this. Who on behalf
 24 of New England Central elected to drop the speed in
 25 response to identifying this defect?

Page 17

1 A. It would have likely been Richard. I don't
 2 recall for sure.
 3 Q. You wouldn't be involved in a decision to
 4 address a track defect?
 5 A. Track inspectors are given the authority to
 6 drop the track speed as they see fit, given the
 7 information that they have, without first conferring
 8 with me.
 9 Q. Okay. Then how did you ultimately discover
 10 that the track speed had been lowered?
 11 A. It was done when we were on the geometry car
 12 the day that this test was conducted.
 13 Q. Okay. All right, then, help me out, because
 14 I'm confusing myself. You're on the test truck.
 15 You go over this stretch of track, correct? And
 16 this comes up -- does this come up almost
 17 immediately on the --
 18 A. Yes.
 19 Q. So was Richard Boucher on the test car with
 20 you, as well?
 21 A. Yes.
 22 Q. So you're both on this test car, and obviously
 23 the defect shows up. You didn't discuss that with
 24 him?
 25 A. Not necessarily.

Page 18

1 Q. Well, how did you know that the slow order or
2 the speed would be reduced in response to that if
3 the decision was made -- in other words, what I
4 think you testified to and this is why I need your
5 help, is that the decision to reduce the speed on
6 this section of line was made while on the test car.
7 Did -- was that conveyed to you by Mr. Boucher on
8 the test car?

9 A. Our practice while on the test car is that
10 when a condition exists or pops up from the test
11 that needs the speed limited due to a defect, we
12 reduce the speed first, immediately after we go over
13 it, or before the track is given up behind the car,
14 and then verify it in the field in the subsequent
15 days, as soon as possible.

16 Q. So when you were on the test car, there was no
17 conversation between you and Richard Boucher saying,
18 "I'm going to drop the speed"?

19 A. Not specifically.

20 Q. But you, based on -- I'm sorry?

21 A. It's a given practice.

22 Q. So you assume that that was the remedial
23 action taken that day?

24 A. Yes.

25 Q. So did you ever go back to confirm that that

Page 19

1 remedial action was taken?

2 A. It should have been placed on a temporary Form
3 C bulletin, and then translated over to our daily
4 operating bulletin in the subsequent days. That
5 should be traceable.

6 Q. Okay, and it would remain on that bulletin
7 until it was corrected?

8 A. Yes.

9 Q. Do you know how this condition of warp or warp
10 62 could affect train operations?

11 A. As opposed -- are you talking about the track
12 speed could affect it, or what --

13 Q. No, the train going -- you identified -- could
14 you repeat your definition of what warp is?

15 A. It's a difference in cross level in a 62-foot
16 segment of track.

17 Q. What does that mean to a layman?

18 A. One rail is higher than another, or the --
19 Excuse me while I figure out the best way to explain
20 it. When you look at the two rails in proportion to
21 each one, one is higher than the other in some
22 cases, as it would be in a curve. A warp would be
23 that it changes too drastically in a 62-foot
24 segment.

25 Q. Okay, so this drastic change, does that

Page 20

1 affect, at whatever speed, how a train would operate
2 over that segment of track?

3 A. It would affect it in rocking, mostly.

4 Q. What do you mean by rock?

5 A. The rail car could rock if there is too much
6 of a change in a certain distance at a certain
7 speed.

8 Q. What would that certain speed be, do you know?

9 A. That's too general. I -- specifically I
10 couldn't tell you what speed would cause what amount
11 of rock. It's based on several factors. There's
12 the car loading. There's no given amount that a car
13 rocks for a certain defect. It's car loading,
14 center of gravity, all that would take into
15 consideration.

16 Q. Do you know if FRA publishes any guidelines or
17 regulations regarding when rock would occur?

18 A. Not when rock would occur. They have
19 guidelines that tell you the maximum allowable,
20 which is what this is referring to, this report from
21 the exception list there. There is a table in the
22 CFR that tells you what the maximum allowable change
23 in a 62-foot segment of track is for each section of
24 track.

25 Q. Correct, but the FRA does publish guidelines

Page 21

1 to some extent?

2 A. Outside of the regulation, I'm not aware of a
3 guideline.

4 Q. Okay. So you're not aware of a theory, let's
5 call it for now, that rock would be more likely to
6 occur under these conditions at a slower speed?

7 A. A theory, no. I'm familiar with the
8 regulation only.

9 Q. Do the regulations say that rock would -- the
10 slower the speed, the more likely rock would occur?

11 A. No, it doesn't speak to rock. It -- you asked
12 what a car would do if it gave -- if it was
13 subjected to this condition.

14 Q. Yeah.

15 A. And I told you it would rock. That's why
16 there's a restriction placed on it, but I don't know
17 of any guidance from the FRA that tells you this
18 specifically.

19 Q. Would anyone from New England Central be aware
20 of that?

21 A. Not to my knowledge.

22 Q. Are you familiar with the term, "wheel lift"?

23 A. Yes.

24 Q. Could you describe what that refers to -- in
25 to your knowledge in the railroad industry,

Page 22

1 obviously?

2 A. Wheel lift would typically be the flange of
3 the wheel is allowed to come up onto the rail, or
4 partially onto the rail head, as opposed to riding
5 on the gauged side of the rail, and it's usually an
6 imbalance that causes it.

7 Q. What do you mean by an imbalance?

8 A. Something causes the other side of the car to
9 go down, so the wheel lifts on the opposite -- it
10 rocks.

11 Q. So if one side of the rail is higher than the
12 other, could that cause wheel lift?

13 A. That's kind of general. In a curve, it's
14 standard to have one side higher than another.

15 Q. If one side is higher than the other, so as to
16 result in the warp condition, could that cause wheel
17 lift?

18 A. Please repeat that. You lost me.

19 Q. Okay, I understand that one rail can be higher
20 than the other, but if one rail -- if that -- that's
21 fine, but at the same time, if one rail is higher
22 than the other and a condition of warp is created,
23 correct?

24 A. Yes.

25 Q. Could that condition of warp in that instance

Page 23

1 cause wheel lift?

2 A. You're asking me to speak to something that
3 I'm not an expert on.

4 Q. I'm asking -- I'm just asking you for your
5 position.

6 A. I can't say what degree of lift would be
7 caused by what condition of track. All I know is
8 that the CFR and the Federal Railroad Administration
9 give a list of criteria that are safe for certain
10 standards of track, and that's what we go by.

11 Q. Okay, other than dropping the speed on the
12 line to the next class, what other remedial options
13 were available, if any?

14 A. Repair the condition.

15 Q. Was that considered?

16 A. Yes.

17 Q. Okay. When was that option considered?

18 A. It's considered immediately after the test,
19 but we repair them not necessarily in the order they
20 were found, but on a basis of when we can fix each
21 individual one. Our machines may not have been in
22 the area at the time, so we were most likely fixing
23 other ones, but not that one at that given point.

24 Q. At what given point?

25 A. Well, right after the test.

Page 24

1 Q. Okay. What about in the period between June
2 8th, 2004, and July 3rd, 2004?

3 A. We had not done work on that specific defect.
4 We had been doing work on other ones.

5 Q. Why would you not elect to perform work at
6 this location on this defect in the period June 8,
7 2004, to July 3rd, 2004?

8 A. It wasn't that we had not elected to. We
9 hadn't got to it yet.

10 Q. So you gave priority to repairing other
11 defects over repairing this defect; is that a
12 correct statement?

13 A. I don't know as it was on a prioritization
14 basis, just necessarily first come-first served, or
15 what we came across first.

16 Q. So if one defect was worse than another, that
17 wouldn't enter into your thinking as to when you
18 address it?

19 A. It would be based on the condition that
20 existed and how it would be prioritized, but they
21 were -- if they were something we could provide
22 remedial action by slow-ordering the track, we did.

23 Q. Okay, was it you were addressing the defects
24 on a first-come-first-serve basis, or addressing
25 defects based on a prioritization?

Page 25

1 A. There's two levels of defect in my mind that
2 we look at. One that shows a Class 0, which needs
3 to be addressed immediately. That it is not
4 necessarily safe for operations. Those are the
5 first. Those are prioritized. We have to do those
6 first. And then after that, it becomes a basis of
7 when we can get the machine to them. Usually we do
8 them in order, first come, first serve. If there's
9 a larger problem that is going to take more time and
10 effort, we may jump over that and prioritize in that
11 respect. There's not a great deal of thought that
12 goes into let's fix these, if we had 50 defects,
13 let's fix them in this order, 1, 2, 3, all the way
14 up to 50 -- that's not the case. There are some
15 that require immediate attention, other ones that we
16 can do in a first-come-first-serve basis.

17 Q. Could you take a look at Lawyer Exhibit 2
18 again, which is the test results?

19 A. Okay.

20 Q. Could you go through here and identify for me,
21 anyway, what some of the more significant defects
22 would be?

23 A. As far as prioritization?

24 Q. Yes.

25 A. The first page would be marked in the third

Page 26

1 column as 120.99. It's a cross level defect.

2 Q. And what type of defect is a cross level
3 defect?

4 A. It's a the maximum allowable, and this is in
5 tangent track, cannot be more than three inches.
6 This is 3.31.

7 Q. Does that have any relation at all to a warp
8 condition?

9 A. No, they're two different defects. They're
10 both with regard to geometry of track, but --

11 Q. And why would you consider that to be a more
12 significant defect than a warp condition?

13 A. Because the limiting class was 0, meaning that
14 it needed to be resolved before we could send
15 another train over it.

16 Q. Okay, whether trains could operate over the
17 line -- Was your main consideration keeping trains
18 running when you decided which defects to address?

19 A. Yes.

20 Q. And that consideration was driven by basically
21 the track class that was identified by the test
22 truck? What I'm trying to get at is on these test
23 results, wherever there's a limiting class of zero,
24 a train could not operate over that segment of track
25 until the defect was corrected; is that a true

Page 27

1 statement?

2 A. Yes.

3 Q. So what causes -- I guess what I'm trying to
4 get to is what causes a limiting class of zero
5 versus a limiting class, say, of 2?

6 A. With respect to cause, it would depend upon
7 the defect.

8 Q. In other words, does a more severe defect lead
9 to a lower limiting class, is I guess basically what
10 I'm asking.

11 A. Yes.

12 Q. And during the period June 8th to July 3rd,
13 2004, were all of the areas identified by a limiting
14 class of zero addressed by New England Central?

15 A. Yes.

16 Q. Was that basically done right after June 8th,
17 2004?

18 A. As I recall, everything was dealt with on June
19 8th that was found on June 8th with respect to
20 zeroes.

21 Q. Then what's the next -- what would the next
22 category of defects be for remedial action? You've
23 taken care of the limiting class zero. What was
24 your plan -- or New England Central's plan, for that
25 matter -- to address the additional defects on this

Page 28

1 report?

2 A. It would be dependent upon the type of defect
3 and what the repair would be. For instance, if it
4 was a short gauge defect that didn't involve our
5 tamper and regulator to travel to it, we could take
6 a truck with a couple guys in it and repair the
7 defect. So that was based, I guess, upon what the
8 repair would be and the magnitude of it. If it was
9 a geometry condition or a surface condition that
10 would require the tamper to do work on it, we would
11 wait for the tamper to get to that point, because
12 it's not cost-effective to travel it up and down the
13 track. You travel it in one direction and hit every
14 defect as you come to it, first-come, first-served.

15 Q. And where did the -- okay, so for any of the
16 limiting Class 3 defects were tampers and
17 regulators --

18 A. I don't recall specifically.

19 Q. Would a tamper or a regulator be necessary to
20 rectify a condition identified as cross level?

21 A. Not necessarily.

22 Q. Could you flesh that out a bit?

23 A. You could do it by hand. Meaning -- well,
24 there's a couple different alternatives. Jacking
25 the track with track jacks and tamping with a

Page 29

1 tamping stick to get the stone underneath the ties
2 could be done. It's a more labor-intensive and
3 time-consuming deal, but in this event, if we had a
4 zero, we would have done that if the tamper wasn't
5 close by.

6 Q. Could that method have been used at Milepost
7 10.16, as well?

8 A. Could have been, yeah.

9 Q. So it's safe to say that after June 8th, you
10 and/or NECR came up with a plan to address the
11 defects noted on Lawyer Exhibit 2, correct?

12 A. Yes.

13 Q. Who was involved in those discussions?

14 A. It would have been myself and Richard Boucher.

15 Q. Anyone else?

16 A. Possibly Joe Spirk, the chief engineer.

17 Q. What about Charles Moore?

18 A. He would have probably not been terribly
19 involved in the decision on how to address them.

20 Q. How many discussions do you think you had with
21 Mr. Boucher regarding a plan to address these
22 defects?

23 A. It would be hard to say. We speak daily,
24 discuss status.

25 Q. Would he ever submit anything in writing to

Page 66

1 the weather would be in Hartland, Vermont, on the
 2 morning of July 3rd, 2004?
 3 A. When I got there.
 4 Q. What time did you get there?
 5 A. I couldn't tell you exactly what time. I can
 6 tell you that it would have been at least two hours
 7 after my notification.
 8 Q. Okay.
 9 A. Making it no earlier than probably 8:30.
 10 Q. Did you talk to anybody -- when you arrived in
 11 Hartland, did you talk to anybody about what the
 12 weather had been like at the time of the derailment?
 13 A. No.
 14 Q. Do you know who would know, other than
 15 obviously the crew on the train, what the weather
 16 was like at the time of the derailment?
 17 A. As I recall, Gene Trombley at the time was in
 18 Windsor, Vermont, at a relative's, when I contacted
 19 him to come help us with the derailment.
 20 Q. And where is Windsor, Vermont, in relation to
 21 Hartland, Vermont?
 22 A. Well, it's ten miles, give or take a mile,
 23 from the derailment site.
 24 Q. Is it similar terrain to Hartland, Vermont?
 25 A. I would say yes.

Page 67

1 Q. Okay, what did he tell you? Did you ask him
 2 about the weather?
 3 A. Not that morning. There was a subsequent
 4 conversation while we were investigating it,
 5 probably several days later, and he recalled it was
 6 sunny.
 7 Q. Did he confirm that he was awake -- The
 8 derailment occurred around 6 in the morning. Strike
 9 that. I'll follow up with him on that. Thank you.
 10 Are you aware that New England Central has prevented
 11 the crew operating the train, the B & M train, on
 12 July 3rd, 2004, from operating on the line, on New
 13 England Central's property -- strike that.
 14 Are you aware that pursuant to the trackage
 15 rights agreement between New England Central and the
 16 Boston & Maine Corporation, Springfield Terminal,
 17 that New England Central has not permitted the crew
 18 operating the train, subject to the July 3rd, 2004,
 19 derailment, they're not allowed to operate on New
 20 England Central's line. Did you know that?
 21 A. Excuse me, that was a fairly long statement.
 22 Q. Yeah, does New England Central permit the crew
 23 operating the train involved in the July 3rd
 24 derailment, can that crew today operate on New
 25 England Central's property?

Page 68

1 A. I can't say with certainty, but I believe they
 2 are allowed to now.
 3 Q. They are?
 4 A. I believe there was a short instance where
 5 they were not, but I guess Charles Moore would be
 6 better versed to answer that question, or Charles
 7 Hunter, our current general manager.
 8 MR. DAVIDSON: You're asking him that
 9 question in terms of personally, because that's one
 10 of the areas --
 11 MR. CULLIFORD: The next question
 12 is -- Yes, you're absolutely right --
 13 BY MR. CULLIFORD:
 14 Q. On behalf of New England Central, do you know
 15 if that crew is allowed to operate?
 16 MR. DAVIDSON: I'm going to be object.
 17 He's not identified to answer to any of the
 18 disciplinary issues that resulted from the
 19 derailment. We'll identify someone else, if you
 20 would like to have someone speak to that.
 21 MR. CULLIFORD: Can we go off the
 22 record real quick?
 23 (A discussion took place off the record.)
 24 MR. CULLIFORD: With the exception of
 25 I've got some questions about the Amtrak agreement

Page 69

1 and the -- we're done.
 2 MR. DAVIDSON: And the weather.
 3 MR. CULLIFORD: Personally, and as a
 4 30(b)(6) witness.
 5 MR. DAVIDSON: So we'll suspend the
 6 30(b)(6), and he's done personally?
 7 MR. CULLIFORD: Yes.
 8 (The deposition concluded at at 11:36 a.m.)
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EXHIBIT “M”

Roger D. Bergeron
January 11, 2007

Volume 1, Pages 1-180

Exhibits: 10-26

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

NEW ENGLAND CENTRAL RAILROAD, INC.,

Plaintiff

v.

Docket No. 04-30235-MAP

SPRINGFIELD TERMINAL RAILWAY

COMPANY and BOSTON AND MAINE

CORPORATION,

Defendants

RULE 30(b)(6) DEPOSITION OF SPRINGFIELD TERMINAL

RAILWAY COMPANY by ROGER D. BERGERON

Thursday, January 11, 2007, 10:11 a.m.

Law Office of Robert H. D'Auria

41 North Road, Suite 205

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-----Reporter: Kathleen Mullen Silva, RPR, CRR-----

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Roger D. Bergeron**January 11, 2007**

(Pages 90 to 93)

<p style="text-align: right;">90</p> <p>1 us, yes.</p> <p>2 MR. DAVIDSON: Could we have this marked</p> <p>3 I think 20, 21, please.</p> <p>4 (Marked, Exhibits 20-21, photocopies of</p> <p>5 photographs.)</p> <p>6 Q. Dan Griffiths was the one who was, you</p> <p>7 thought, trying to get the pictures?</p> <p>8 A. To the best of my knowledge, yes.</p> <p>9 Q. And you have not seen any photographs in</p> <p>10 the possession of the STRC that they took themselves</p> <p>11 since your termination, correct?</p> <p>12 A. To the best of my knowledge, no.</p> <p>13 Q. Do you know whether or not the car that</p> <p>14 derailed, which you don't remember the number of it,</p> <p>15 was caused to derail by a car following it, or was</p> <p>16 it caused to derail because of something that</p> <p>17 happened to it at that point?</p> <p>18 A. There was one car -- only one truck of one</p> <p>19 car derailed at milepost 10.2, in that general area,</p> <p>20 and that's what the marks indicated, is one truck</p> <p>21 derailed of one car.</p> <p>22 Q. But you don't know what caused that to</p> <p>23 derail in terms of forces from other cars, do you?</p> <p>24 A. I don't know if it was caused by a force of</p>	<p style="text-align: right;">92</p> <p>1 talking about open-loaded cars, open top-loaded cars</p> <p>2 or anything. We're talking about boxcars.</p> <p>3 A. Evidence of shifting is -- you'd have to</p> <p>4 look at or inspect the lading. What I'm saying is</p> <p>5 it's not impossible to do it if it's like newsprint</p> <p>6 or bales of steel coils, things of that nature. You</p> <p>7 know, newsprint and all that stuff there, not only</p> <p>8 is it loaded, but it's also like packed into cars.</p> <p>9 So to see its proximity to the door and to the</p> <p>10 ceiling and all that, even with the car on the side,</p> <p>11 you'd be able to see a missing or shift in a roll.</p> <p>12 Q. Even if the car was on its side?</p> <p>13 A. You could very well, yeah, on newsprints</p> <p>14 and heavy coils and things of that nature, even if</p> <p>15 it's on its side, yes.</p> <p>16 Q. What was the lading in the car that</p> <p>17 derailed?</p> <p>18 A. I don't know. I'm not too sure.</p> <p>19 Q. Did you ever make that determination at the</p> <p>20 scene?</p> <p>21 A. I never inspected inside the car at the</p> <p>22 scene.</p> <p>23 Q. Did you ever ask anyone what was the lading</p> <p>24 in that box car?</p>
<p style="text-align: right;">91</p> <p>1 another car.</p> <p>2 Q. Isn't it true that derailments can occur</p> <p>3 because of load shifting?</p> <p>4 A. That is correct.</p> <p>5 Q. Isn't it true that derailments can occur</p> <p>6 because of a defective center of gravity in the rail</p> <p>7 car?</p> <p>8 A. That is correct.</p> <p>9 Q. You weren't able to establish whether or</p> <p>10 not the loads in the rail car that derailed shifted;</p> <p>11 were you?</p> <p>12 A. I didn't determine that, no.</p> <p>13 Q. In fact, the STRC didn't determine it</p> <p>14 either because the rail car was on its side when</p> <p>15 they got there, correct?</p> <p>16 A. I believe the car was on its side when they</p> <p>17 got there, that is correct.</p> <p>18 Q. So it would be impossible, once the car is</p> <p>19 on its side, to determine the load shift, wouldn't</p> <p>20 it be?</p> <p>21 A. Not necessarily.</p> <p>22 Q. How would you be able to determine a load</p> <p>23 shifting with a rail car on its side after</p> <p>24 derailment? We're talking about boxcars. We're not</p>	<p style="text-align: right;">93</p> <p>1 A. I believe I did.</p> <p>2 Q. And you don't recall what it was?</p> <p>3 A. Not right now, no.</p> <p>4 Q. Now, excessive speed can also cause a</p> <p>5 derailment, correct?</p> <p>6 A. Yeah, excessive speed can cause a</p> <p>7 derailment.</p> <p>8 Q. The load shifting could cause a derailment?</p> <p>9 A. That is correct.</p> <p>10 Q. Binding of the -- well, a stiff truck</p> <p>11 itself could cause a derailment, couldn't it?</p> <p>12 A. Oh, yeah.</p> <p>13 Q. Car rocking action could cause a</p> <p>14 derailment?</p> <p>15 A. That is correct.</p> <p>16 Q. And there's a number of things that can</p> <p>17 cause a car to start rocking, correct?</p> <p>18 A. That is correct.</p> <p>19 Q. A defect in the car could cause that?</p> <p>20 A. That's correct.</p> <p>21 Q. A defect in the track could cause that?</p> <p>22 A. That is correct.</p> <p>23 Q. A combination of things could cause that?</p> <p>24 A. That is correct.</p>

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<p style="text-align: right;">94</p> <p>1 Q. The actual truck suspension and side 2 bearings could also have an effect and cause a 3 derailment, is that a true statement? 4 A. That's a true statement. 5 Q. What did you do to determine whether or not 6 the trucks on the derailed car were stiff or not 7 stiff? 8 A. I spoke with the mechanical officer about 9 the condition of the car. 10 Q. Did you ask him that specifically? 11 A. I asked him if there was anything in the 12 car that would have contributed to wheel lift in the 13 derailment that he noticed. 14 Q. And he said no? 15 A. He said the best that he'd seen, to his 16 knowledge -- he didn't take any exception to what 17 he'd seen at the derailment site at the time. 18 Q. But you don't know if he specifically 19 examined the trucks on the derailed car, do you, 20 specifically? 21 A. Specifically, no. I wasn't there, no. 22 Q. And you don't know whether or not the load 23 shifted or not? Did you ever ask him that question? 24 A. I asked if he took any exception to</p>	<p style="text-align: right;">96</p> <p>1 where they sat down and wrote out what they believed 2 happened. 3 A. I believe, and in the transcript I've seen 4 a copy of a GTI incident report made out by the 5 conductor. 6 Q. I'm not asking about reports. I'm asking 7 did anyone ever obtain a written statement from the 8 crew, either the engineer or the conductor, where 9 they wrote out what they believe occurred, happened 10 and the sequence of what happened. I'm not asking 11 about any reports. I'm asking for a verbatim 12 statement, "I, so and so, Kari, being the whatever 13 officer on the engine of train whatever," you know, 14 describing what happened? 15 A. When I reviewed the transcript of the 16 hearing, in the transcript was that report. That is 17 made out by the conductor, and that is his 18 information as to what happened as to the cause of 19 derailment. 20 Q. I understand he wrote a report. I'm asking 21 at the scene, did anyone get a statement from either 22 crew member? That's what I'm asking. 23 A. I don't know. 24 Q. You don't know. That's a fine answer. So</p>
<p style="text-align: right;">95</p> <p>1 anything inside the car or anything. He said he 2 didn't see anything in the lading. I believe when I 3 first asked him, he said he hadn't been in the car 4 yet. 5 Q. At any point in time before you made your 6 determination, did you talk to anyone who had been 7 in that rail car? 8 A. Before? 9 Q. Before you made your determination as to 10 the cause of the derailment. 11 A. No. 12 Q. So you didn't know whether or not the load 13 shifted when you made your determination, correct? 14 A. As far as the lading, no. 15 Q. You never interviewed the crew, did you? 16 A. No, I did not. 17 Q. Did the STRC ever obtain a written 18 statement from the crew? 19 A. To my -- I didn't. 20 Q. But did the company? You're testifying on 21 behalf of the company right now. 22 A. Well, in the hearing -- 23 Q. I'm not asking in the hearing. A written 24 hearing, not oral testimony, but a written statement</p>	<p style="text-align: right;">97</p> <p>1 you didn't rely on any written statement from the 2 crew that you obtained to make a determination? 3 A. No written statements, no. 4 Q. During the course of your investigation, 5 isn't it true that it's deemed to be important to 6 document and record the crew's observations and 7 actions immediately before the derailment? 8 A. Could you ask the question again? 9 Q. Sure. Let me rephrase it this way: 10 According to the train derailment cause findings by 11 the AAR that your company has adopted, isn't it true 12 that the interview has a purpose to secure and 13 document, as well as record the observations and the 14 actions of the crew? 15 A. That is correct. 16 Q. And that wasn't done in this case, was it? 17 A. I don't say it was done. 18 Q. Well, have you ever reviewed a written 19 statement of the crew's observations and actions 20 prior to you making your determination as to the 21 cause of the derailment? 22 A. No, I did not. 23 Q. And as far as you understand, you know of 24 no written statements, do you?</p>

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<p style="text-align: right;">118</p> <p>1 A. Not between the point of derailment and 2 station negative 3. 3 Q. What about before the point of derailment? 4 A. Yes. 5 Q. Would you indicate for us which station 6 that you find an exception as a certified track 7 inspector, according to your measurements that you 8 did on whatever day that was -- it says July 3 on 9 it. 10 A. No. July 6. 11 Q. Okay. July 6. 12 A. About 11:30. 13 Q. Does that refresh your memory as to when 14 you were out there? 15 A. Yeah. 16 Q. So you were out there three days after the 17 derailment, correct? 18 A. That is correct. 19 Q. Okay. Good. 20 A. Now, what was the question? 21 Q. Would you mark which station that you find 22 an exception with in terms of being a certified 23 track inspector as to the measurements that you 24 took.</p>	<p style="text-align: right;">120</p> <p>1 those points? 2 A. Yes, I am. 3 Q. Where are you talking about now? 4 A. Now what I'm talking about is a reading 5 that goes between 5 and another mark of a joint, and 6 that says 6 1/2 plus 3/8. And then the reading 7 between a second one that says 5 and another one 8 that says 6 1/2 and another one that says 5 5/8 and 9 the crosslevel here that says 5-inch. In those 10 differences here, you have the beginnings of what 11 they -- it's 213.63, that's the federal requirement. 12 And it's the difference in your rock-off hazards. 13 Q. And where is that contained in the federal 14 regulations? 15 A. It's 49 CFR Part 213.63, that's a standard 16 that covers track surface. 17 Q. Now, for the sake of the record, you 18 pointed to a number of places here. For the sake of 19 the record, would you please go back and reference 20 those by the station numbers that you have, and if 21 you need to add in additional letters for your inner 22 curve, that would be fine. Would you please label 23 this one A, B and C. 24 A. (Witness marking diagram.)</p>
<p style="text-align: right;">119</p> <p>1 A. It would be station 3. 2 Q. And what about station 3 that you found an 3 exception? 4 A. Between station 3 and the point of 5 derailment, at station 3 we have a 6 1/4 inch static 6 reading with an additional -- it looks like a 7 quarter of an inch. It might even be a half -- with 8 an additional -- I can't really make it out on this. 9 It's either an eighth -- 1/8. It's an additional 10 reading, or maybe 1/6, 1/8. It's very hard to make 11 it out on this copy. 12 Q. Okay. What about that? 13 A. Between that and the point of derailment, 14 the difference in crosslevel is -- it's about an 15 inch and three eighths, roughly. 16 Q. Okay. What should it be? 17 A. Between -- I don't establish the speed on 18 the New England Central for the curvature. 19 Q. Well, that section of track was set at 25 20 miles per hour class 2. Does that conform with 21 class 2 requirements of the FRA? 22 A. Between these readings here -- 23 Q. We were just talking about 3 and the point 24 of derailment. Are you changing -- are you leaving</p>	<p style="text-align: right;">121</p> <p>1 Q. Now, where were you taking your 2 measurements from before in your previous testimony? 3 You pointed to a 5-inch -- 4 A. Oh. (Witness marking document.) 5 Q. Okay. Would you describe those for the 6 jury? 7 A. I just marked for the transcript A, B and C 8 as being on what I know to be the west rail -- 9 Q. Correct. 10 A. -- on this chart here. The areas that I 11 was talking about where I gave 5, 5, 5 5/8 and 5 12 7/8, when we gave it earlier, were readings that 13 were indicated as joints on the east rail that 14 aren't marked with anything. 15 Q. Would you mark those with D, E and so forth 16 until you exhaust your markings. 17 A. (Witness complies.) 18 Q. Now, would you describe for the jury again 19 what you take exception to from those calculations? 20 A. It's the geometry readings that you take 21 when you go with E plus A, F plus B and G plus C. 22 When you get those six pairs of joints, you end up 23 with a reading that -- and I don't know 24 specifically -- I don't know the wording exactly out</p>

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<p style="text-align: right;">150</p> <p>1 Q. And White River Junction is near where this 2 derailment occurred, correct? 3 A. Oh, yes, very near. 4 Q. How close would you say it's to where the 5 derailment occurred? 6 A. White River Junction. I can tell you right 7 by the chart. White River Junction is milepost 17.2 8 and where it derailed was 10.7. 9 Q. So about 7 miles? 10 A. 7 miles, yes. 11 (Marked, Exhibit 25, dispatching sheet.) 12 Q. In order to prepare for your testimony 13 today, as well as reviewing for the B&M's and the 14 STRC's deposition earlier this week, did you have a 15 chance to look at the inspection reports for this 16 line? 17 A. Yes. 18 Q. In fact, have you come to the knowledge 19 that the line was inspected approximately two days 20 before the derailment by the NECR's track inspector, 21 approximately July 1? 22 A. I don't know if I'd reach that conclusion. 23 Q. Well, did you see an inspection report 24 dated July 1?</p>	<p style="text-align: right;">152</p> <p>1 Q. Stop right there. Is that milepost 0 -- 2 your understanding? 3 A. Mileage 0 to 76.5. 4 Q. Okay. 5 A. And then there's no information filled out. 6 And the categories go, "Rail, joints, spikes, tie 7 plates, rail anchors, frog, switch point, switch 8 inspection in yards, mileage, switch stand, switch 9 plates, guardrail, crossing, ties and timber and 10 right-of-way." Under "remarks" column it says, "WR 11 junction siding is okay," and the date is 7/1/04. 12 Q. There's no exception taken at any mileage 13 indication for any portion of that line, correct? 14 A. There's nothing filled in on this report 15 except the remarks column that says "WR junction 16 siding is okay." Or that could be "UK," but 17 something "okay." 18 Q. In fact, at the top of the report, doesn't 19 it say the track foreman or inspector will prepare 20 report each day, "Circle defects requiring 21 attention. If more space is required, use back of 22 sheet," correct? 23 A. That is correct. 24 Q. So if nothing was circled, that would</p>
<p style="text-align: right;">151</p> <p>1 A. I was provided with a list of -- 2 Q. Yes or no, sir? 3 A. No, I did not. 4 Q. You never saw the -- what inspection 5 reports were you reviewing? 6 A. I was provided with a list of NECR 7 inspection reports. I was told they were inspection 8 reports, but it looked more like a work product for 9 a maintenance crew. 10 Q. Have you ever seen this document that's 11 entitled NECR daily track inspection report for July 12 2004? 13 A. Yes, I have. 14 Q. Was that part of your review? 15 A. I have reviewed this, yes, this was part of 16 my review. 17 Q. And that says that the line between the 18 mileposts in question was inspected on July 1, 19 correct? 20 A. It says that -- well, I guess -- it says 21 the daily track inspection report -- I'll read 22 directly from it. The document says "000," it looks 23 like either "292" or "392." And it says, "Mileage 0 24 to 76.5 Roxbury sub."</p>	<p style="text-align: right;">153</p> <p>1 indicate there were no defects found, correct? 2 A. I guess, yeah. 3 Q. Now, in fact, have you ever seen the report 4 for June 29, '04 for that same section of track? 5 Have you ever seen this document? 6 A. I believe I looked through a document. 7 Q. For that date? 8 A. Yes. 9 Q. In fact, no exceptions were taken to any 10 portion of the line that day either, was there? 11 A. Yeah. 12 Q. Where? 13 A. The report that I'm looking for is 000895, 14 that's what I'm looking at. It's from 0 to 50.5. 15 Again, under the remarks column it says that White 16 River Junction siding is okay. It says something 17 Boucher patrolled from 74 to 50, and then it says, 18 under "ROW," "Remove obstructions near track" and 19 then there's two numbers in the number column, 16.95 20 and 19.95. 21 Q. Now, were those the only two records you 22 reviewed from the inspection reports? 23 A. No, it was not. 24 Q. Did you review all of June and all of</p>

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<p style="text-align: right;">170</p> <p>1 Q. Did anyone ask you for information or data 2 to support their position or their opinion regarding 3 those issues, i.e. did Larry Ferguson or someone 4 like him come to you and say, "Hey, I need this 5 information because it's my position these guys 6 should be back on the line. I need this information 7 to support my position"? 8 A. No, no one did. 9 Q. You've also been identified today to talk 10 about the damages that the STRC is claiming in this 11 case. What knowledge do you have regarding the 12 damages that you're claiming? 13 A. The mechanical department damages are the 14 only damages I know that I have been appointed. 15 MR. DAVIDSON: Off the record. 16 (Discussion held off the record.) 17 MR. DAVIDSON: Back on the record. The 18 STRC is going to identify someone else to testify as 19 to the damages that they're claiming in their 20 counterclaim in this lawsuit and we'll work out a 21 date and time to get that together. We're also 22 going to have someone else identified regarding 23 negotiating, drafting of the Trackage Rights 24 Agreement. And that's what we reserved on so far.</p>	<p style="text-align: right;">172</p> <p>1 test car and the geometry car is telling you that 2 you have an exception, let's say at milepost 5 and 3 it's telling you you can go from class 3 to class 2 4 track, what would you do in response to that on the 5 geometry car? 6 A. Either remove the track from service or 7 protect it with a slow one. 8 Q. There would be no reason to remove it from 9 service if you're going from class 2 to 3, would 10 there? 11 A. From a 3 to a 2? 12 Q. Correct. 13 A. If it was undisputable, no, there would be 14 none. 15 Q. So you could reduce it down to class 2, 16 which means you're just reducing it from 40 miles an 17 hour to 25, correct? 18 A. Class 3 allows you to do -- or the speeds 19 are class 2 is 25 for freight and 30 for passenger. 20 Q. I'm only talking about freight, because 21 we're both freight railroads. 22 A. If we're strictly talking freight, it's 25 23 miles an hour, correct. 24 Q. Now, that's one of the remedial actions you</p>
<p style="text-align: right;">171</p> <p>1 Am I right? 2 MR. WRIGHT: To my knowledge, yes. 3 Q. A couple last things here. Have you ever 4 been party to an FRA geometry report on the B&M or 5 STRC? 6 A. Yes. 7 Q. Have you ever been someone who was involved 8 with the actual testing? 9 A. Yes. 10 Q. So you've actually ridden in a test car 11 before? 12 A. Yes. 13 Q. When you ride in a test car, what was your 14 role? 15 A. I've been track supervisor, roadmaster, 16 engineer of track for a territory. 17 Q. Let me stop you right there. Have you done 18 it in each one of those capacities? 19 A. Yes. 20 Q. In any of those capacities, were you the 21 person responsible for reading the data as it was 22 being generated during the test ride? 23 A. Directly, yes, I have. 24 Q. So if you were riding down the track in the</p>	<p style="text-align: right;">173</p> <p>1 can take immediately, correct? 2 A. That is correct. 3 Q. And you're doing that to protect the track 4 and the trains coming down? 5 A. Subsequent movements behind you on the 6 line. 7 Q. Now, the other remedial action you do is to 8 repair it, correct? 9 A. The initial remedial action, if I was the 10 track supervisor of the territory, is to put the 11 appropriate speed restriction or remove the track 12 from service. If it was field verified, then that 13 guy could put it back into class 2. If I found a 14 condition that I thought, even though it says class 15 2, I still may want to check it because it was 16 suspect. I might take it out of the service until 17 one of my people field verified it, and I would tell 18 him by radio to check this spot here and give him 19 the location to fields verify. 20 Q. If your employee found that, in fact, there 21 was a defect there, but it only reduced it down to 22 class 2, you could still operate it with the 23 restricted speed? 24 A. That is correct. If under field</p>

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<p style="text-align: right;">174</p> <p>1 verification, it was found that there wasn't any 2 other extenuating circumstances, the ties were tight 3 to the rail and in pretty good shape and all that, 4 then the speed restriction would be enough to make 5 the initial remedial action appropriate. 6 Q. Then after that, after you verified it and 7 it existed, you would then take the second remedial 8 action, which would be then to fix or repair it, 9 correct, to bring it back up to class 3? 10 A. Correct. 11 Q. Because you want to be running at class 3 12 in a freight railroad of your size, right? 13 A. That is correct. I mean, if -- well, in 14 general. I mean, if -- that may not be true. 15 Q. Okay. What situation would that exist 16 where that's not true? 17 A. If I found enough conditions out there that 18 the initial remedial repair to 25 miles an hour 19 really wouldn't make sense because I found other 20 conditions that would promote poor train handling, 21 like there was a ten miles an hour the mile before 22 that, there would be no sense in let's get this up 23 to 40 miles an hour, when actually we're asking an 24 engineer to kind of pick up and slow down and pick</p>	<p style="text-align: right;">176</p> <p>1 Q. Now, let me ask you this question: Is 2 there anything that you've testified to so far today 3 where your answer would be different on behalf of 4 the Boston & Maine? 5 A. No. 6 Q. With that representation and with your 7 agreement that you will carefully review your 8 transcript of your testimony, that you'll let us 9 know within 30 days if there's any information that 10 is different on behalf of the Boston & Maine, I'll 11 be glad to suspend this deposition for the time 12 being, and I'll be glad to suspend the Boston & 13 Maine's 30(b)(6) as well. 14 Is that agreeable, counsel? 15 MR. WRIGHT: It sounds reasonable. 16 Q. This way we don't have to go through the 17 same questions all over again. The answers for the 18 Boston & Maine would be the same as they are for the 19 Springfield on the questions we've gone over today? 20 A. That is correct. 21 MR. DAVIDSON: We're going to suspend. 22 We're going to wrap some things up with the other 23 witnesses, and we'll start tomorrow morning with the 24 other guys.</p>
<p style="text-align: right;">175</p> <p>1 up and slow down. So what you would do is you would 2 gather all that data. The answer to the question is 3 it's not necessarily everything is listed back to 4 the class. I guess that's the answer. 5 Q. Ultimately you want your freight railroad 6 to be running at the highest class it can be running 7 at, correct? 8 A. At the highest timetable speed. 9 Q. If you can get up to class 3, that would be 10 optimal, correct? 11 A. That is correct. 12 Q. So in that situation just described, if you 13 had some other places on that same line that were 14 down to class 1, you would obviously put together a 15 program to take care of the different defects to 16 bring everything back up to class 3? 17 A. That is correct. 18 Q. That's all I meant. I didn't mean it in 19 isolation. I meant you would then make it part of a 20 repair program or a fix program. 21 A. Yes. 22 Q. All right. 23 MR. DAVIDSON: I just want to reserve on 24 that.</p>	<p style="text-align: right;">177</p> <p>1 MR. WRIGHT: Okay. 2 MR. DAVIDSON: And we'll get the 3 engineer and conductor and Larry. 4 MR. WRIGHT: That's correct. 5 (Marked, Exhibit 26, STB Finance Docket 6 Number 31250.) 7 (3:21 p.m., proceedings adjourned.) 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p>

EXHIBIT “N”

10/20/99, for all non-PI Incidents

This form meets requirements of FRA F 6180.97

EXHIBIT “O”

RAIL AMERICA'S ATLANTIC REGION DISPATCH CENTER

INCIDENT DOCUMENTATION FORM

RAILROADS (CIRCLE) TPW NCTR VCSO OTVR SCRF VSRR CPDR NVVA CA

TIME: 0641 LOADS/EMPTIES: 14-5 TONS: 1780 DATE: 7/3WEATHER CONDITIONS: Clear Temperature: _____TRAIN: WJLO ENGINE NUMBER(S): MEC 372-370 LOCATION: S.S. Rpt. Sub.ENGINEER: Karl MILEAGE: 5.5CONDUCTOR: Scappato MAIN TRACK ☒ YESCONDUCTOR: _____ OBSTRUCTED ☐ NO

PAGED (CIRCLE)

OFFICIALS CONTACTED: Lewis TIME: 0642 YES ☒ NOMurphy TIME: 0643 YES ☒ NOLiano TIME: 0650 YES ☒ NOBm. Day TIME: 0648 YES ☒ NOBm. Chief TIME: 0650 YES ☒ NOTIME: _____ YES ☐ NOINJURIES: None

FRA NOTIFIED: 800-424-8802 REPORT NUMBER: _____

OPERATING INFORMATION:APPROXIMATE SPEED 22 AMPS Approx. 200THROTTLE POSITION 2nd 1/4 notchBRAKING (CIRCLE) INDEPENDENT DYNAMIC ☒ AUTOMATICCROSSING INVOLVED (CIRCLE) YES ☒ NO

MAINTAINER NOTIFIED _____ TIME: _____

FORM CONTINUED ON REVERSE SIDE

EXHIBIT “P”

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**BOSTON AND MAINE CORPORATION
and
SPRINGFIELD TERMINAL RAILWAY COMPANY**

v.

NEW ENGLAND CENTRAL RAILROAD, INC.

Docket No. _____

FORMAL COMPLAINT AND PETITION FOR DECLARATORY ORDER

JURISDICTION

1. The Board has jurisdiction to adjudicate this formal complaint pursuant to 49 U.S.C. §§ 11701 and 11704(b). The Board has jurisdiction to issue a declaratory order pursuant to 49 U.S.C. § 721 and 5 U.S.C. § 554(e) to terminate a controversy or remove uncertainty.

PARTIES

2. The Boston and Maine Corporation ("B&M") is a common carrier by rail subject to the jurisdiction of the Board pursuant to 49 U.S.C. § 10501(a). B&M maintains its principal place of business at Iron Horse Park, North Billerica, Massachusetts 01862.

3. The Springfield Terminal Railway Company ("ST") is a common carrier by rail subject to the jurisdiction of the Board pursuant to 49 U.S.C. § 10501(a). ST maintains its principal place of business at Iron Horse Park, North Billerica, Massachusetts 01862.

4. New England Central Railroad, Inc. ("NECR") is a common carrier by rail subject to the jurisdiction of the Board pursuant to 49 U.S.C. § 10501(a). NECR maintains its principal place of business at 2 Federal Street, Suite 201, St. Albans, Vermont 05478.

FACTS COMMON TO ALL CLAIMS

5. In a decision served February 6, 1990, the Board's predecessor in interest, the Interstate Commerce Commission ("ICC"), imposed the terms and conditions of a trackage rights order ("TRO") upon the B&M and NECR's predecessor in interest, Central Vermont Railway, Inc. ("CV").

6. The TRO was imposed by the ICC as part of the compensation to be paid to B&M in an eminent domain proceeding brought by the National Railroad Passenger Corporation ("Amtrak") to acquire a line of railroad located between White River Junction, Vermont and East Northfield, Massachusetts (the "Line").

7. CV acquired its interest in the Line from Amtrak subsequent to the eminent domain proceeding and subject to the requirement that CV grant trackage rights to B&M.

8. ST subsequently succeeded to the rights of B&M under the trackage rights agreement and currently operates trains on the Line.

9. NECR acquired the assets of CV, including the Line and CV's rights and responsibilities under the TRO, in 1995. NECR continues to own and operate the Line.

10. As the owner of the Line, NECR is required to inspect and maintain the line to a standard that is in compliance with the TRO and the Track Safety Standards promulgated by the Federal Railroad Administration ("FRA").

11. NECR also is required to maintain the Line in a safe condition for its intended uses.

12. NECR failed to inspect or maintain the Line to such standards in multiple locations along the Line, including the location where the derailment described below began.

13. Moreover, specialized testing performed on or about June 8, 2004 by FRA on the Line had disclosed that there were multiple locations along the line that were unsafe, did not meet FRA Class II standards, and were otherwise in violation of the FRA Track Safety Standards.

14. The results of this testing were provided to NECR before the Derailment, yet NECR failed to correct these dangerous conditions on the Line.

15. On or about July 3, 2004, an ST train was operating southbound on the Line when a car partially derailed near Hartland, Vermont.

16. Upon reaching a switch on the Line, the partially derailed car fully derailed, along with six additional cars.

17. The cause of this derailment (the "Derailment") was a defective, unsafe track condition.

FORMAL COMPLAINT FOR DAMAGES

First Cause of Action—Breach of the Interstate Commerce Act and an Order Issued Thereunder

18. B&M and ST repeat and reallege the allegations of Paragraphs 1 through 17 as if fully set forth here.

19. Part A of Subtitle IV of Title 49 of the United States Code (the "Interstate Commerce Act" or "ICA") and the TRO ordered by the ICC require NECR to maintain the Line at not less than FRA Class II condition.

20. The Line and, in particular, the portion of the Line where the Derailment began, was not being maintained by NECR at the time of the Derailment in a safe condition, nor was it being maintained in accordance with the TRO or the FRA Track Safety Standards.

21. NECR knew or should have known that the Line was not in Class II condition and not safe at the time of the Derailment.

22. NECR's failure to maintain the Line safely and in Class II condition was the cause of the Derailment.

23. NECR's failure to maintain the Line safely and in Class II condition violated the ICA and the TRO.

24. NECR's failure to maintain the Line safely and in Class II condition damaged B&M and ST in excess of \$100,000, including damaged or destroyed railroad cars, excess per diem costs, wrecking and rerailling costs and excess crew costs.

Second Cause of Action—Breach of Contract

25. B&M and ST repeat and reallege the allegations contained in Paragraphs 1 through 24 as if fully set forth here.

26. Pursuant to Sections 3.2 and 3.3 of the TRO, NECR is solely responsible for the maintenance and repair of the Line at all times to not less than FRA Class II condition in exchange for the payment of a trackage rights fee by ST.

27. The Derailment was caused by the failure of NECR to maintain the Line in accordance with its obligations under the TRO and the Track Safety Standards established by the FRA.

28. This failure of NECR to perform its obligations constituted a breach of the TRO, which is a contract between NECR, on the one hand, and B&M and ST, on the other.

29. As a result of NECR's breach of contract, B&M and ST suffered damages in excess of \$100,000, including damaged or destroyed railroad cars, excess per diem costs, wrecking and rerailling costs and excess crew costs.

Third Cause of Action—Tortious Injury to B&M and ST Due to Gross Negligence, Recklessness, and Willful Misconduct of NECR

30. B&M and ST repeat and reallege the allegations contained in Paragraphs 1 through 29 as if fully set forth here.

31. NECR had a duty to maintain the Line in safe condition for B&M, ST and all other users thereof.

32. Portions of the Line—including the section where the Derailment began—were in substandard condition, in breach of applicable federal regulations, unsafe for users such as B&M and ST, and hence presented a substantial risk of derailment of B&M and ST's trains.

33. NECR knew of these adverse conditions.

34. NECR nevertheless failed to maintain the Line in an appropriate, safe, and legally sufficient condition.

35. NECR therefore breached its duty to B&M and ST in a grossly negligent, reckless, and willful manner.

36. B&M and ST were injured in excess of \$100,000, including damaged or destroyed railroad cars, excess per diem costs, wrecking and rerailling costs and excess crew costs, as the result of NECR's misconduct.

REQUEST FOR DECLARATORY ORDER

37. B&M and ST repeat and reallege the allegations contained in Paragraphs 1 through 36 as if fully set forth here.

38. NECR's breach of its duties under the ICA, the TRO, and at common law was grossly negligent, reckless, or willful.

39. NECR's breach of such duties was the proximate cause of the Derailment.

40. NECR has taken the position that under the terms of the TRO, ST is solely responsible for all expenses arising out of the Derailment, including expenses relating to the repair of the track and other expenses incurred by NECR, even if the sole cause of the Derailment was NECR's breach of its duties under the ICA, the TRO, and at common law.

41. In furtherance of this position, NECR has demanded payment by B&M and ST of approximately \$750,000, allegedly constituting NECR's expenses in respect of the Derailment.

42. In support of this position, NECR apparently relies upon Section 7.1 of the TRO, which NECR interprets as apportioning to B&M and ST all responsibility for the Derailment even if the Derailment was caused solely by NECR's grossly negligent, reckless, or willful misconduct.

43. Such an interpretation does not reflect the intent of the parties, or of the ICC, at the time the terms and conditions of the TRO were imposed.

44. Such an interpretation also would be contrary to public policy and the intent of the ICA, the Federal Rail Safety Act, and other applicable statutes, regulations, and orders.

WHEREFORE, B&M and ST respectfully request that the Board enter an order—

- (1) declaring that the TRO does not apportion any liability to B&M or ST for damages caused by NECR's gross negligence, recklessness, and willful misconduct;
- (2) awarding B&M and ST compensatory, incidental, and punitive damages due to NECR's violation of the ICA, the TRO (as order and as contract), and NECR's common law duties;
- (3) awarding B&M and ST their costs in connection with this proceeding, including a reasonable attorneys' fee; and
- (4) awarding B&M and ST such other and further relief as may be just.

B&M and ST suggest that this proceeding be handled under the Board's Modified Procedures.

Respectfully submitted,



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Dated: October 29, 2004

CERTIFICATE OF SERVICE

I certify that on this 1st day of November 2004, I served a copy of the foregoing document upon the respondent, New England Central Railroad, Inc., by facsimile and overnight courier, at the following address and facsimile number:

Chief Legal Officer
New England Central Railroad, Inc.
2 Federal Street, Suite 201
St. Albans, Vermont 05478

Fax no. 802-527-3455.

The cover page of the facsimile transmitting and the cover of the envelope containing such copy bear the legend, "Service of STB Complaint."


Bonnie J. Boling

EXHIBIT “Q”

35695
EB

SERVICE DATE – JANUARY 10, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34612

BOSTON AND MAINE CORPORATION
and
SPRINGFIELD TERMINAL RAILWAY COMPANY
v.
NEW ENGLAND CENTRAL RAILROAD, INC.

Decided: January 9, 2006

We are granting, in part, the petition of Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (ST) jointly, "BM/ST" or "complainants") for reconsideration of our prior decision dismissing their complaint and petition for a declaratory order arising out of the derailment of a BM/ST train on track owned by the New England Central Railroad, Inc. (NEC).

BACKGROUND

In Amtrak – Conveyance of B&M in Conn River Line in VT & NH, 4 I.C.C.2d 761 (1988) (Amtrak I), the Board's predecessor agency, the Interstate Commerce Commission (ICC), required B&M to convey its 48.8-mile "Connecticut River Line" to the National Railroad Passenger Corporation (Amtrak), subject to the requirement that Amtrak grant specified trackage rights back to B&M. The ICC also authorized Central Vermont Railway, Inc. (CV) to acquire the conveyed line from Amtrak and to operate it, subject to B&M's trackage rights. The carriers were directed to negotiate a trackage rights arrangement containing certain core requirements designed to ensure that the tenant carrier would be able to continue to conduct rail freight operations over the line.

During their negotiations, the carriers operated under a temporary trackage rights agreement. When the parties were unable to agree on certain terms for a permanent agreement, the ICC issued a decision in Amtrak – Conveyance of B&M in Conn River Line in VT & NH, 6 I.C.C.2d 539 (1990) (Amtrak II), clarifying its core requirements, resolving the disagreements, and adopting the detailed trackage rights terms and conditions attached as an appendix to that decision, herein called "the trackage rights order" (TO). Many provisions of the temporary agreement were not in dispute and were carried over into the TO without further discussion. In

STB Finance Docket No. 34612

subsequent transactions, NEC acquired CV's assets, including its rights and responsibilities under the TO, and B&M assigned its trackage rights over the line to its subsidiary, ST.

On November 1, 2004, BM/ST filed a complaint and petition for declaratory order arising out of the derailment of an ST train operating on NEC's Connecticut River Line track on or about July 3, 2004. ST's train was operating on NEC's track pursuant to the TO issued in Amtrak II. Complainants alleged that the derailment was caused by NEC's failure to maintain the track as required by the TO and Federal Railroad Administration (FRA) regulations and that, as a consequence, BM/ST suffered damages in excess of \$100,000. BM/ST requested compensatory, incidental, and punitive damages based on breach of contract (the TO) and tortious injury due to gross negligence, recklessness, and willful misconduct by NEC. NEC responded that any claims based on the condition of the track are barred by Section 7.1 of the TO.¹ BM/ST argued that NEC's interpretation of Section 7.1 is contrary to public policy because it would apportion all responsibility for the derailment to BM/ST even if the derailment was caused solely by grossly negligent, reckless, or willful misconduct by NEC. NEC has brought an action in Federal district court to recover damages. New England Central R.R. v. Boston and Maine Corp., Civ. Action No. 04-30235 - MAP (D. Mass., filed Dec. 3, 2004).

By decision served on February 24, 2005 (February 2005 Decision), we dismissed BM/ST's complaint and petition for a declaratory order. We explained that this dispute is not within the Board's primary jurisdiction because the dispute is founded primarily on claims of breach of contract and tortious actions. We reasoned that the dispute involves neither the interpretation of core operational provisions of the TO nor service questions, but is, rather, a dispute over liability for a derailment, an area over which the Board has little expertise and limited jurisdiction. For this reason, we concluded that the court is the appropriate forum to resolve the parties' dispute.

¹ Section 7.1 of the TO provides (6 I.C.C.2d at 564):

7.1 Save as herein otherwise provided, each party hereto shall be responsible for and shall assume all loss, damage or injury (including injury resulting in death) to persons or property, including the cost of removing any trackage, repairing trackage and correcting environmental damage, which may be caused by its engines, cars, trains or other on-track equipment (including damage by fire originating therefrom) whether or not the condition or arrangement of the trackage contributes in any manner or to any extent to such loss, damage or injury, and whether or not a third party may have caused or contributed to such loss, damage or injury, and for all loss or damage to its engines, cars, trains or other on-track equipment while on said trackage from any cause whatsoever, except in the case of collision, in which event the provisions of Section 7.2 shall apply.

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On March 10, 2005, BM/ST filed a petition for reconsideration of that decision. Complainants do not dispute our finding that this controversy predominantly involves claims of breach of contract and tortious actions arising from a train derailment and that the court is better suited to resolving such fact-bound issues. But complainants argue that the Board should, at a minimum, decide whether Section 7.1 of the TO was intended by the ICC to absolve the track owner (now NEC) from liability claims that are based on gross negligence or willful misconduct. On March 30, 2005, NEC filed a reply in opposition to BM/ST's petition for reconsideration.

DISCUSSION AND CONCLUSIONS

In the February 2005 Decision, we mistakenly assumed that Section 7.1 was not in dispute when the TO was adopted and concluded that the Board's expertise was not required to determine the intent of the parties regarding Section 7.1. We will grant reconsideration to the extent required to provide guidance on the proper interpretation of the provision that the agency imposed.

As noted by complainants, the Board has expressly declined to impose a contested provision that would excuse a carrier from liability resulting from its own gross negligence or willful misconduct, finding such a provision to be contrary to public policy. See National R.R. Passenger Corp. – Applic. – 49 U.S.C. 24308(a), 3 S.T.B. 157, 162 (1998). The concerns expressed by the Board in that case apply with equal force here. The statute requires that the Board implement policies that “promote a safe and efficient rail transportation system” and “operate transportation facilities and equipment without detriment to the public health and safety.” 49 U.S.C. 10101(3), (8). To construe TO Section 7.1 as excusing gross negligence and willful misconduct would not encourage safe operations, and it would contravene well-established precedent that disfavors such indemnification provisions.² Thus, we do not believe that it was the intent of the agency in imposing TO Section 7.1 to allow the landlord carrier to escape liability for maintenance failures that are the result of its own gross negligence or willful misconduct, and we do not construe TO Section 7.1 in that manner.

The remaining issues involved in the complaint are fact-bound, and they predominantly involve claims of breach of contract and tort. For the reasons discussed in the February 2005 Decision, we will continue to defer to the courts the resolution of the remaining issues.

It is ordered:

1. Complainants' petition for reconsideration is granted to the extent discussed above.

² See National R.R. Passenger Corp. v. Consolidated Rail Corp., 698 F. Supp. 951, 971-72 (D.D.C. 1988), rev'd on other grounds, 892 F.2d 1066 (D.C. Cir. 1990); see also Harris v. Howard University, Inc., 28 F. Supp. 2d 1, 14 (D.D.C. 1988).

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2. This decision is effective on its date of service.

By the Board, Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary